NO. 82128-3

SUPREME COURT OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Petitioner,

v.

ROBERT O'NEEL, et al.,

Respondents.

RESPONDENTS' RESPONSE TO SUPPLEMENTAL BRIEF OF AMICI

ROBERT M. MCKENNA
Attorney General

DANIEL J. JUDGE, WSBA #17392
Senior Counsel
AMANDA M. MIGCHELBRINK, WSBA #34223
Assistant Attorney General
Attorney General's Office
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ARGUMENT

A. THE PLAIN LANGUAGE OF THE PLRA REQUIRES THAT ATTORNEY FEES BE INCURRED IN PROVING VIOLATION OF THE PRISONER'S RIGHTS, NOT THE RIGHTS OF THE GENERAL PUBLIC.

The Prison Litigation Reform Act (PLRA) limits the award of attorney's fees in cases brought by a prisoner alleging violation of federal law:

> [i]n *any action brought by a prisoner* who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, *such fees shall not be awarded*, except to the extent that—
> (A) the fee was directly and reasonably incurred in *proving an actual violation of the plaintiff's rights* protected by a statute pursuant to which a fee *may be awarded under section 1988* of this title; and . . .
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the order for the violation.

42 U.S.C. § 1997e(d)(1) (emphasis added).

Amici erroneously argue that Mr. Parmelee is entitled to attorney fees because he is "presumptively entitled" to them under 42 U.S.C. § 1988. Supp. Br. of Amici at 2-3. However, under the plain language of the PLRA, recovery of attorney's fees is available only if the fees were incurred in proving an actual violation of the plaintiff's rights. 42 U.S.C.

§ 1997e(d)(1). In fact, the PLRA presumes that fee awards may **not** be granted in prisoner cases under § 1988.

The PLRA restriction on fees claimed under § 1988 applies to all suits by prison inmates, not just those related to prison conditions. *Jackson v. State Board of Pardons and Paroles*, 331 F.3d 790, 796 (11th Cir. 2003). This action was brought by a prisoner, Mr. Parmelee. Therefore, "[h]is recovery of fees is therefore restricted by the PLRA." *Siripongs v. Davis,* 282 F.3d 755, 757-58 (9th Cir. 2002).

Amici erroneously argue that Mr. Parmelee became entitled to fees when the Court of Appeals determined the criminal libel statute was unconstitutional. *See* Supp. Br. of Amici at 3 (citing *Muhammad v. Dipaolo*, 138 F.Supp.2d 99, 101, 108 (D. Mass 2001) (contending First Amendment rights "are abridged *the moment a state silences free speech* or prevents a citizen from following the precepts of his religion.") (Emphasis by Amici).

Amici's argument fails because it presumes prisoners have the same rights as free individuals. Under the PLRA, such rights must be consistent with their status as prisoners in order to be "an actual violation of the plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). Where a prisoner contends his constitutionally protected rights are impinged, the court must consider whether the actions taken by prison officials were reasonably

related to legitimate penological goals in order to determine whether a civil rights violation has occurred. *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 96 L. Ed.2d 64 (1987). *Turner* reversed prior federal case law, holding that prison officials could interfere with an inmate's constitutionally protected rights only if their action was greater than necessary for the preservation of institutional safety. *Id.* The United States Supreme Court reaffirmed the standard articulated in *Turner*, and indicated that it is to be applied "in *all* cases in which a prisoner asserts that a prison regulation violates the Constitution." *Washington v. Harper*, 494 U.S. 210, 224, 110 S. Ct. 1028, 108 L.Ed.2d 178 (1990) (emphasis added); *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001) (referencing *Turner* as a "unitary, deferential standard for reviewing prisoners' constitutional claims").

The Washington Court of Appeals applied the *Turner* analysis to Mr. Parmelee in a personal restraint proceeding when he was infracted for referring to a King County Jail official as a "piss-ant" or "asshole" in a grievance. *See In re Parmelee*, 115 Wn. App. 273, 276-77, 284, 63 P.3d 800 (2003). The basis of the infraction was a violation of the jail's "insolence" rule. Mr. Parmelee argued that he was legally entitled under the First Amendment to use such language when filing a grievance, including a First Amendment right to refer to another officer as a "prick"

and state that the officer should get fired before he gets "fucked up". *Id.* at 278-79. The Court of Appeals rejected Mr. Parmelee's First Amendment arguments, citing *Turner* and its progeny, and concluded that there are legitimate reasons to prohibit use of profane language in prison inmate grievances, including: (1) requiring inmates to behave respectfully towards prison staff; and (2) maintaining order for all inmates by limiting tension between guards and residents. *Parmelee*, 115 Wn. App. at 284-87. The Court also found that there were other avenues available to Mr. Parmelee, including use of appropriate language to address the problems alleged. The Court noted that as in the prison setting, profane statements are not allowed in a court petition or other legal process. *Id.*

Under Amici's argument, Mr. Parmelee could claim attorney fees every time he filed a First Amendment challenge to an infraction based on his use of profanity-laden language in a grievance. This line of reasoning would nullify the language in § 1997e(d)(1) and it directly conflicts with *Turner v. Safley.* Under the PLRA, and the holding in *Turner,* an inmate cannot claim attorney's fees based on the impairment of speech that a free citizen is entitled to engage in. The Respondents are aware of no federal authority (before or after enactment of the PLRA) allowing prisoners to claim attorney's fees where their claims were defeated under *Turner.*

Amici's argument impliedly requests that the Court ignore the plain language of the statute and look only to the Amici's representation of legislative intent. However, as the Ninth Circuit Court of Appeals stated, in applying the PLRA, the Court begins with the language of the statute itself. "Because we believe the PLRA's language is clear on its face, 'the sole function of the court[ ] is to enforce it according to its terms.'" *Siripongs*, 282 F.3d at 758 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed.2d 290 (1989)). The plain language of the PLRA requires that fees be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights . . ." 42 U.S.C. § 1997e(d)(1)(A). "The plain meaning of an 'actual violation' of plaintiff's rights excludes a violation that has not been proven in fact, but merely has been asserted. *Siripongs*, 282 F.3d at 758.

The cases cited by Amici under the PLRA fail to support Mr. Parmelee's claim for attorney fees. See Supp. Br. of Amicus at 6-7.[1] Two

[1] Amici cite another unpublished case, *Watts v. Director of Corrections*, 2007 WL 1100611 (E.D. Cal. 2007). However that district court decision was reconsidered, resulting in a new unpublished decision. *Watts v. Director of Corrections*, 2007 WL 1752519 (E.D. Cal. 2007). The revised, unpublished decision in *Watts* upholds a grant of attorney fees where the inmate claimed partial success resulting from a stipulation by prison officials to remove prison disciplinary records from the inmate's prison file without a determination of actual violation. This case is inapposite. The revised decision in *Watts* is not based on a determination that a violation of actual rights has been proven. The unpublished revised opinion in *Watts* avoids the application of § 1997e(d)(1)(A) by citing Ninth Circuit case law that proof of a constitutional violation is not required for claims of attorney fees under 42 U.S.C. § 1988 where cases are resolved by settlement. 2007 WL 175219 *3. Such language ignores and contradicts the plain language of

of these fee award cases were based on determinations that the inmate plaintiffs' rights were actually violated. *See Dannenberg v. Valdez*, 338 F.3d 1070, 1072 (9th Cir. 2002) (attorney fees awarded after jury determination that inmate was retaliated against by prison officials); *Chatin v. State of New York*, 1998 WL 293992 (S.D.N.Y. 1998) (unpublished), *aff'd sub nom. Chatin v. Coombe*, 186 F.3d 82 (2nd Cir. 1999) (attorney fees awarded after district court determined inmate's actual rights were violated under prison disciplinary rule that was unconstitutionally vague).

B. THERE IS NO ALTERATION IN THE LEGAL RELATIONSHIP BETWEEN THE PARTIES.

The United States Supreme Court has repeatedly held that attorney fees are available only if the relief secured by the plaintiff "directly benefit[s] him at the time of the judgment or settlement." *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992), citing *Hewitt v. Helms*, 482 U.S. 755, 764, 107 S. Ct. 2672, 96 L. Ed.2d 654 (1987). A plaintiff prevails only when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-12; s*ee Rhodes v. Stewart,* 488 U.S. 1,

---

§ 1997e(d)(1)(A) requiring proof of an actual violation. *Watts* is also distinguishable because no settlement has occurred here. Consequently, the District Judge's reliance on Ninth Circuit authority in *Watts* has no applicability in this case.

3-4, 109 S. Ct. 202, 102 L. Ed.2d 1 (1988) (no attorney's fees despite declaratory order that prison officials violated First and Fourteenth Amendment rights, since one plaintiff died and the other was no longer in custody).

Although the Court of Appeals determined that the state criminal libel statute, RCW 9.58.010, is facially invalid, the Court of Appeals clearly indicated it was making no determination that Mr. Parmelee's federally protected rights were actually violated. *Parmelee v. O'Neel*, 145 Wn. App. 233, 246-247, 186 P.3d 1094 (2008).

The Amici contend that the relationship between the parties was materially altered when the infraction was expunged. In making this argument, the Amici ignore the fact that prison inmates do not enjoy the full panoply of rights afforded a defendant in a criminal proceeding. *In re Personal Restraint of Higgins,* 152 Wn.2d 152, 165, 95 P.3d 330 (2004). Although Mr. Parmelee's infraction referencing RCW 9.58.010 is expunged, the Court of Appeals' determination that the Washington State Department of Corrections cannot incorporate an unconstitutional state statute into the prison disciplinary code does not impact a federally protected interest held by Mr. Parmelee or any other inmate.[2] Mr.

[2] Federal law extends Mr. Parmelee no guarantee regarding how a state's prison disciplinary code must be structured. As this Court has observed, well-settled federal law gives prison officials wide berth in conducting prison disciplinary proceedings, consistent

Parmelee can be infracted for the same misconduct under a different disciplinary rule. Washington law allows prison officials to expunge infractions and re-infract prisoners when there is an error in the infraction proceedings. *Id.* at 165-66. Therefore, prison officials can infract Mr. Parmelee for the same misconduct, citing a different disciplinary rule. WAC 137-28-220(1)(202) (2005) (prohibiting "[a]busive language, harassment or other offensive behavior, directed to or in the presence of staff, visitors, inmates, or other persons or groups."); WAC 137-28-260(1)(659) (2005) (prohibiting "[s]exual harassment; any word, action, gesture or other behavior that is sexual in nature and that would be offensive to a reasonable person.")

In addition to having no impact on prison officials' ability to infract Mr. Parmelee for the conduct at issue in this case, the Court of Appeals' decision does not alter the material relationship of the parties by precluding the Department from infracting Mr. Parmelee and other prisoners for insolent behavior and language in the future. *See* WAC 137-25-030(659) (2009); WAC 137-28-220(202) (2009).

---

with the fundamental priority of maintaining the peace, clearly distinguishing them from criminal proceedings. *Higgins,* 152 Wn.2d at 163-64, (citing *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). Consequently, the minimum due process under *Wolff* is limited to receiving notice of the alleged violation, getting an opportunity to present evidence when not hazardous to the operation of the prison, and receiving a written statement of the evidence relied upon and the reasons for the disciplinary action. *Personal Restraint of Gronquist,* 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999) (citing *Wolff*).

The legal relationship of the parties is unaltered. Amici appear to contend that any sort of enforceable order, no matter how nominal the relief, entitles the plaintiff to attorney fees. The United States Supreme Court has clearly rejected this argument and held that "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Farrar,* 506 U.S. at 115. As the Court noted, the awarding of nominal damages in a civil rights suit "highlights the plaintiff's failure to prove actual, compensable injury." *Id.* The Court of Appeals' ruling does not impact prison officials' ability to discipline Mr. Parmelee for the conduct at issue in this case or future conduct. Since Mr. Parmelee has not shown an actual violation of his rights, the PLRA does not permit him to recover attorney's fees. '"[T]he moral satisfaction that results from any favorable statement of law' cannot bestow prevailing party status." *Farrar,* 506 U.S. at 113 (quoting *Hewitt,* 482 U.S. at 762).

The Court of Appeals' ruling does not recognize a federal right for prison inmates to invoke "insolent, abusive, or scurrilous language" in grievances or other communication regarding prison staff. *Parmelee,* 145 Wn. App. at 245. Nor does the ruling impact prison officials' ability to discipline Mr. Parmelee for the conduct at issue in this case or future

conduct. Since Mr. Parmelee has not shown an actual violation of his rights, the PLRA does not permit him to recover attorney's fees.

C. THE PLRA'S REACH REGARDING ATTORNEY'S FEES EXTENDS BEYOND FRIVOLOUS CASES BY INMATES; CONGRESS REDUCED THE RISKS OF ATTORNEY FEE AWARDS RESULTING FROM THE DAILY DECISIONS OF PRISON OFFICIALS.

Amici erroneously argue that the state's position conflicts with the policy goals of the PLRA. They contend that the PLRA is aimed at only frivolous claims by prisoners, not claims having partial merit. Supp. Br. of Amicus at 8-11. However, the reach of the PLRA clearly was not restricted to law suits in which inmates allege their civil rights were violated because they received the wrong kind of peanut butter. The clear and unambiguous language in the fee provisions of 42 U.S.C. § 1997e(d)(1) presents an overhaul by Congress of attorney fee claims in all prisoner civil rights cases, frivolous or not. *See Robbins v. Chronister,* 435 F.3d 1238, 1244 (10th Cir.2006) (citation omitted). Since the language of the federal statute is unambiguous, review of Congressional intent is not necessary. *Siripongs*, 282 F.3d at 758; *Skamania County v. Woodall*, 104 Wn. App. 525, 532-33, 16 P.3d 701 (2001) (in interpreting federal statutes, courts look first to the plain language of the statute to determine congressional intent).

The statute's plain language demonstrates that Congress, by enacting § 1997e(d)(1), reduced the risk to prison officials that a day-to-day management decision would result in an attorney fee claim. The language of the law clearly establishes that inmates do not have the same statutory right to an award of attorney's fees as a non-inmate civil rights litigant. In enacting § 1997e(d)(1), Congress made the statutory fee provisions in prisoner cases more consistent with the substantive federal case law granting prison officials greater deference in their daily decision-making. *See Turner*, 482 U.S. at 89. If Mr. Parmelee proves on remand that his rights were actually violated by the reference to the unconstitutional statute, he will be able to request attorney's fees. Unless he proves his rights were violated, attorney's fees are clearly barred by the PLRA.

//

//

//

//

//

//

II. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the prison officials' briefing, the Respondents respectfully request that this Court affirm the Court of Appeals' ruling regarding attorney fees.

RESPECTFULLY SUBMITTED this 29th day of October, 2009.

ROBERT M. MCKENNA
Attorney General

DANIEL J. JUDGE, WSBA #17392
Senior Counsel
AMANDA M. MIGCHELBRINK, WSBA #34223
Assistant Attorney General
Attorney General's Office
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

I certify that I served a copy of the **RESPONDENTS' RESPONSE TO SUPPLEMENTAL BRIEF OF AMICI** on all parties or their counsel of record as follows:

- ☐ US Mail Postage Prepaid
- ☒ Via email
- ☐ United Parcel Service, Next Day Air
- ☐ ABC/Legal Messenger
- ☐ State Campus Delivery
- ☐ Hand delivered by _____

TO: HANK BALSON
PUBLIC INTEREST LAW GROUP PLLC
hbalson@pilg.org

SARAH DUNNE
NANCY TALNER
ACLU OF WASHINGTON
dunne@aclu-wa.org
ntalner@aol.com

DUSTIN BUEHLER
ROGER LEISHMAN
DAVIS WRIGHT TREMAINE LLP
rogerleishman@dwt.com
dustinbuehler@dwt.com

DANIEL G. FORD
COLUMBIA LEGAL SERVICES
dan.ford@columbialegal.org

EXECUTED this 29th day of October, 2009 at Olympia, WA.

Karen Thompson
KAREN THOMPSON